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April 1, 2011

VIA ECFS
Ms. Marlene Dortch
Secretary
Federal Communications Commission
445 12th St., SW
Washington, DC 20554

Re: Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, CC Docket No. 01-92, WC Docket Nos. 10-90, 07-135, and 05-337 and GN Docket No. 09-51 (Feb. 8, 2011): Northern Valley Communications, LLC and Bluegrass Telephone Company d/b/a Kentucky Telephone Initial Comments

Dear Ms. Dortch:

Pursuant to sections 1.415 and 1.419 of the Commission's rules, please find the Initial Comments of Northern Valley Communications, LLC and Bluegrass Telephone Company d/b/a Kentucky Telephone filed today in the above mentioned rulemaking proceeding.

Please contact me if you have any questions.

Sincerely,

Ross A. Buntrock

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Connect American Fund	)	WC Docket No. 10-90
	)	
A National Broadband Plan for our Future	)	GN Docket No. 09-51
	)	
Establishing Just and Reasonable Rates for Local Exchange Carriers	)	WC Docket No. 07-135
	)	
	)	
High-Cost Universal Service Support	)	WC Docket No. 05-337
	)	
Developing an Unified Intercarrier Compensation Regime	)	CC Docket No. 01-92
	)	

COMMENTS OF BLUEGRASS TELEPHONE COMPANY, INC. D/B/A KENTUCKY TELEPHONE AND NORTHERN VALLEY COMMUNICATIONS, LLC REGARDING SECTION XV OF THE COMMISSION'S NOTICE OF PROPOSED RULEMAKING AND FURTHER NOTICE OF PROPOSED RULEMAKING

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COMMENTS OF BLUEGRASS TELEPHONE COMPANY, INC. D/B/A KENTUCKY TELEPHONE AND NORTHERN VALLEY COMMUNICATIONS, LLC REGARDING SECTION XV OF THE COMMISSION'S NOTICE OF PROPOSED RULEMAKING AND FURTHER NOTICE OF PROPOSED RULEMAKING

Bluegrass Telephone Company, Inc. d/b/a Kentucky Telephone ("Kentucky Telephone") and Northern Valley Communications, LLC ("Northern Valley"), by counsel, hereby provide these initial comments in response to Section XV of the Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking ("NPRM") in the above-captioned dockets.[1]

I. SUMMARY

In the comments set forth below, Kentucky Telephone and Northern Valley evaluate and respond to the Commission's NPRM from the perspective of two Competitive Local Exchange Carriers ("CLECs") that share the following characteristics: (1) both are rural CLECs that provide a variety of telecommunications services, including broadband Internet access, in their rural communities; (2) both also provide services to high volume customers, such as those that

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1 The Commission has established a separate response deadline with regard to the matters addressed in Section XV of NPRM.

provide free conference calling to the public; (3) both have voluntarily adopted and tariffed a lower composite rate for traffic terminating to these high volume customers; (4) both have been engaged in protracted litigation with Qwest and Sprint (and, in Kentucky Telephone's case, Level 3) regarding the payment of access charges for calls terminating to these high volume services, because these IXCs have engaged in "self help" in direct violation of the applicable tariffs; and (5) both, though doubting that the Commission's record demonstrates that current rates are unjust or unreasonable, welcomes a resolution of this issue by the Commission, so long as the resolution produces certainty and makes clear that the IXCs must pay the rates established by the Commission.

The comments examine that assumptions embraced by the Commission in the NPRM with regard to the need for "access stimulation" rules. These assumptions include that: "access stimulation" results in unjust and unreasonable rates; "access stimulation" imposes costs on consumers that are not utilizing the free conferencing calling and similar services; "access stimulation" imposes costs on IXCs that deter broadband Internet deployment and divert capital from more useful initiatives; and every carrier that has a revenue sharing agreement will have volumes of traffic that are on par with the largest RBOC/ILEC in the state. As discussed in detail below, the assumptions, despite being the lynchpin that purportedly supports the Commission's proposed rules, are not at all supported by data in the existing record.

To the extent that the Commission moves forward with its stated intent to adopt new rules, Kentucky Telephone and Northern Valley asks the Commission to consider setting the rural CLEC benchmark for those with revenue sharing in place at the rate established by NECA for the Rate Band 1 local switching element. In other words, rural CLECs with revenue sharing agreements could establish a composite rate that does not exceed the rate that NECA Rate Band

1 carriers may assess for local switching alone. This is a preferable benchmark to the Commission's proposal because it provides certainty and uniformity across the industry.

For carriers with revenue sharing agreements, but relatively low volumes of traffic, the requirement to mirror the RBOC/ILEC rate may result in rates that are insufficient to meet costs (irrespective of the ability to share revenues). Accordingly, if the Commission does not adopt the proposal provided by Kentucky Telephone and Northern Valley, and in light of the inherent discrepancies that would result from the Commission's proposal to require CLECs to mirror the RBOC or the largest ILEC in the state, the commenters requests that the Commission provide CLECs with the ability to elect to establish their tariffed rates in accordance with section 61.38 of the rules, rather mandating that all carriers mirror the RBOC/ILEC rate.

Kentucky Telephone and Northern Valley also ask the Commission to provide certain clarifications insofar as it adopts the current proposed rules. These points of clarification include: (1) the lower rate for carriers with revenue sharing agreements would apply only to the traffic subject to such an agreement; (2) a carrier that meets the trigger has not made an irrevocable election and may again modify its rates if, in the future, it no longer meets the trigger; and (3) to the extent the Commission adopts a benchmark that involves mirroring another carrier's rate for various elements (rather than a composite rate), the Commission should clarify that the CLEC is entitled to the "full" benchmark rate because it is serving "end users."

Finally, the comments also discuss the reasons why the Commission should reject its initial conclusion that it can block carriers with revenue sharing agreements from filing a tariff on 15 days' notice and thereby prevent the carrier from having its tariff "deemed lawful" pursuant to 47 U.S.C. §204(a)(3). Such a punitive rule is supported by neither the plain language of the statute nor existing case law and should be flatly rejected. Moreover, the Commission should use this opportunity to finally provide certainty after years of relentless litigation by making clear that IXCs have an obligation to pay tariffed rates that are consistent with any pricing rules that the Commission may adopt.

II. BACKGROUND

Northern Valley is a competitive local exchange carrier in Aberdeen, South Dakota. It provides wireline and wireless broadband internet access, digital video, local and long-distance telephone service, website hosting, computer leasing, and conference calling in rural South Dakota, where the company serves over 4,000 residents and businesses. According to the latest data available from the South Dakota Public Utilities Commission, this makes Northern Valley the fifth largest CLEC in South Dakota.

Northern Valley also provides local exchange service to conference calling companies that make free or low cost conference calling available to nonprofits, government agencies, and businesses throughout the country. As a result of serving these types of high volume end users, Northern Valley has been the victim of unlawful self-help campaigns of IXCs, particularly Qwest and Sprint, which has diverted resources from Northern Valley's core business of providing advanced telecommunications services. These fights have forced Northern Valley to discontinue efforts to expand its broadband network and to downsize its workforce.

Kentucky Telephone provides wireline and wireless broadband Internet access, digital video, local and long-distance telephone service, dial-up ISP, and conference calling in rural Grayson County, Kentucky, where the company serves over 1,500 residential and business customers, including many of the County's public schools and emergency management facilities. Kentucky Telephone has made significant investments in its community over the past fifteen years to bring advanced telecommunication services to unserved and underserved populations, including pioneering broadband Internet access in Leitchfield, Kentucky.

Like Northern Valley, Kentucky Telephone also provides local exchange service to conference calling companies that make free or low cost conference calling available to the public and, as a result, has been the victim of unlawful self-help campaigns of Qwest, Sprint, and Level 3, which has forced Kentucky Telephone to downsize its workforce and delay plans for expanding its broadband service offerings in Kentucky.

III. THE COMMISSION'S DISCUSSION OF "ACCESS STIMULATION" INCLUDES MANY UNSUPPORTED ASSUMPTIONS

In the Commission's discussion regarding its intent to adopt new regulations to address "access stimulation," the Commission makes a number of unsupported assertions. As discussed more fully below, many of the assertions appear to be adopted from the advocacy of the IXCs. In litigation parlance, therefore, one might call many of the Commission's assertions "double hearsay," because they are positions stated by the IXCs and then repeated again by the Commission, all without any evidence of the "facts" that are being asserted. Accordingly, the commenters respectfully urge the Commission to avoid taking actions based on this hearsay and, rather, to first seek verifiable data from those that have made the assertions.

A. UNSUPPORTED ASSUMPTION: FURTHER REGULATION IS NECESSARY

The Commission's discussion of so-called "access stimulation" begins from the premise that further regulation is necessary in order to curtail a problem. However, as Northern Valley, Kentucky Telephone, and other commenters have noted, the notion that the Commission would add an extra layer of regulation to LECs, generally, and CLECs, in particular, is at odds with the deregulatory intent of Congress when it passed the "Act to Promote Competition and Reduce Regulation in Order to Secure Higher Quality Services for American Telecommunications Consumers and Encourage the Rapid Deployment of New Telecommunications Technologies," otherwise known as the Telecommunications Act of 1996. The Commission's discussion of the purported need for its proposed rules is not grounded in *any* statutory text, and the Commission has failed to explain how the methodology that it adopted approximately ten years ago for CLEC access charges is now insufficient to produce rates that are just and reasonable.

It should give the Commission significant pause that the same carriers that continuously give voice to a desire for more and more *de*regulation of the telecommunications marketplace are simultaneously insisting that regulation is both appropriate and necessary for other carriers. In short, while arguing for the FCC to take a hands off approach with regard to the members of the telecommunications oligopoly, those same carriers have used their powerful lobbying machines to divert time, energy, and resources to address a perceived problem, a "problem" which is neither clearly defined nor the impact of which is clearly documented in the existing record.

Former Commissioner Furchtgott-Roth filed comments in the Commission's 07-135 docket on November 30, 2010, wherein he appropriately challenged the Commission's presumption that further regulation was necessary and appropriate. As he articulated in those comments:

> rules with respect to [CLECs] were addressed nine years ago. At that time, the Commission specifically rejected the necessity of additional regulation. Now, many years later, and with much more competition in the telecommunications markets, the Commission in this proceeding fails to acknowledge that issues raised in the NPRM have already been addressed, and fails to recognize that the Commission has already decided not to impose additional regulations at least on CLECs. Presumably, the Commission should explain why it now changes its mind, particularly absent any changes in law, any relevant changes in market conditions, or any relevant changes in other circumstances. Telecommunications markets are far more competitive today and in need of less regulation than nine years [ago] when the Commission concluded that CLECs needed no additional regulation. The Commission offers no explanation for why more regulation is needed today.[2]

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[2] *See* Comments of Harold Furchtgott-Roth, Docket 07-135, (Nov. 30, 2010), at 10.

Nothing has changed since Mr. Furchtgott-Roth made his comments in late 2010, and the Commission's latest NPRM does nothing to address this glaring omission. Indeed, the Commission cites to no *verified* data regarding the volume of the purported problem with regard to CLECs, and, as discussed more below, no long-distance carrier has even attempted to demonstrate that the costs they incur for these calls actually exceed the revenue that they generate as a result of their customers being able to participate in the conference calling services offered by Kentucky Telephone and Northern Valley's customers.

B. UNSUPPORTED ASSUMPTION: FREE CONFERENCE CALLING IS HARMFUL TO THE GENERAL PUBLIC

The Commission's NPRM, apparently echoing the rhetoric of Qwest and Sprint, makes several provocative statements regarding the negative impacts of free conference calling and similar services, including:

> Although the conferencing or adult chat lines may appear as "free" to a consumer of these services, the significant costs of these arbitrage arrangements are in fact borne by the entire system as long-distance carriers that are required to pay these access charges must recover these funds from their customers.
>
> Access stimulation imposes undue costs on consumers, inefficiently diverting the flow of capital away from more productive uses such as broadband deployment, and harms competition. Although long-distance carriers are billed for and pay for minutes associated with access stimulation schemes, all customers of these long-distance providers bear these costs and, in essence, ultimately support businesses designed to take advantage of today's above-cost intercarrier compensation system.[3]

These observations of purported facts appear to be the underpinning for the Commission's conclusion that further regulation is necessary. However, neither passage is supported by any citation to record evidence and both contain numerous unproven assumptions.

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[3] NPRM, ¶ 636 & 637.

For example, the suggestion that the calls appear as "'free' to a consumer," ignores the reality that the consumer must pay its long-distance carrier for the long-distance call. Certainly, some carriers have opted to provide unlimited long-distance plans, in which case there would be no incremental cost for those carrier's customers to join a conference call. Many consumers, however, continue to have per minute plans, in which case the bridging service itself may be "free," but the calls are not free in the least.

Similarly, the assertion that the "costs of these arbitrage arrangements are in fact borne by the entire system as long-distance carriers that are required to pay access charges must recover these funds from their customers," is valid only insofar as the revenue received by the IXCs (including an appropriate proportion of the revenue for those with unlimited long-distance plans) is less than the costs actually paid by the IXCs for terminating the calls. Here, though reported as fact by the Commission in the NPRM, the assumption is flawed for two reasons: (1) despite repeated requests by Northern Valley and Kentucky Telephone, no carrier has actually proffered any evidence regarding revenues generated for delivering calls to these services (query why, after four years of intense legal and policy battles over this issue, no carrier would offer this data if, in fact, it supported their rhetoric); and (2) despite significant evidence to the contrary, the Commission assumes that the IXCs are paying high tariffed rates for delivering these calls. In fact, as the Commission actually knows, some carriers, primarily Qwest and Sprint, are *not* paying *anything* for the calls, as they have been engaged in unlawful self-help for many years. Moreover, the Commission has also been advised that other carriers have been able to negotiate commercial rates well below the traditional rural CLEC rates, and that some carriers, including Northern Valley and Kentucky Telephone, have voluntarily adopted tariffs that include lower rates specifically for these high volume services. As such, the unverified estimate of "total billings" does not establish the purported "facts" upon which the Commission rests its proposed new regulations.

The Commission's other assertion that access stimulation diverts "the flow of capital away from more productive uses such as broadband deployment, and harms competition," is equally flawed. Here again, the Commission offers no citation to support this conclusion. And, as with its other assertions, the Commission ignores the inconvenient truth that small carriers, including Northern Valley and Kentucky Telephone, are making broadband Internet access available in unserved and underserved areas and that the IXC's unlawful self-help has diverted the flow of capital away from these carriers, both of which have at all times attempted to conduct their business within the boundaries established by the Commission's CLEC Access Charge Orders. But, perhaps more importantly, the Commission has failed to explain how putting more money in the pockets of IXCs will result in more homes, schools, and businesses being connected to broadband Internet. Indeed, IXCs are not in the business of deploying broadband to underserved and underserved areas.

And, despite its *ipse dixit,* there is no support for the notion that "access stimulation" harms competition. In order to understand the impact on competition, the Commission would have to identify which market it is analyzing. There does not seem to be any evidence to establish that "access stimulation" somehow gives Northern Valley or Kentucky Telephone an unfair competitive advantage to the ILECs with which they compete. And, to the extent that it has produced unfair advantages among IXCs, it is only because some carriers fulfill their common carrier obligations to pay tariffed access charges, while the Commission has turned a blind eye to those, such as Qwest and Sprint, who do not. Accordingly, in that limited regard, access stimulation may be said to harm competition among IXCs, but the unlawful action of some IXCs in no way supports the adoption of the new rules governing LECs that is anticipated by this NPRM.

Moreover, the Commission's analysis is myopic because it ignores the reality that as total wireline access subscribership decreases across the industry, this decrease has a significant and disproportionate impact on small rural carriers such as Northern Valley and Kentucky Telephone, who have been the ones to pioneer the delivery of advanced communication services in their rural communities. And, as a result of this reality, combined with the Commission's guidance in the *Seventh Report and Order*, these carriers began offering service to these high volume customers that the Commission pejoratively terms "access stimulation."[4] While this reality no doubt conflicts with the narrative that the Commission has adopted in order to justify more regulation, good public policy simply cannot be made with the unquestioning acceptance of the IXCs' unsubstantiated allegations.

C. UNSUPPORTED ASSUMPTION: ALL LECS WITH REVENUE SHARING AGREEMENTS WILL HAVE TRAFFIC VOLUMES COMPARABLE TO RBOCS

Finally, though the proposed modification to the CLEC benchmark will be discussed more fully below, Kentucky Telephone and Northern Valley note that the Commission's proposal for the rate to be adjusted to reflect the RBOC rate or the largest ILEC in the state is premised on the assertion that the "modification recognizes that competitive LECS that meet the trigger have access demand likely to be more comparable to that of the [R]BOC in the state or of the incumbent LEC."[5] Again, this assertion is not supported by citation to any record evidence and, respectfully, defies logic.

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4 *In re Access Charge Reform*, CC Docket 96-262, 16 FCC Rcd. 9923 (2001) ("*Seventh Report and Order*").

5 NPRM, ¶ 665.

Certainly, some carriers that have as customers certain high volume services and that have established over time their ability to effectively meet the demands of these customers, may have volumes of traffic that approach the RBOC or largest ILEC in their state, but it certainly does not hold true that every carrier that has a revenue sharing agreement would have such demand. There simply does not appear to be any evidence in the record comparing the volumes of traffic terminating to those carriers with existing revenue sharing agreements with the RBOC/ILEC carriers that the Commission suggests would be an appropriate comparison.

Indeed, the available evidence establishes that there is no such correlation. In February 2011, Kentucky Telephone originated and terminated a total of 9,015,882 minutes of traffic, including local, intrastate long-distance, and interstate long-distance traffic. As demonstrated in the table below, there are several NECA carriers that have comparable volumes of traffic on their network. And, each of these carriers are entitled to asses local switching rates that range from \$0.011069 to \$0.018449/mou, *plus* additional amounts for other elements involved in providing switched access. In other words, a carrier that has approximately 400% more traffic than Kentucky Telephone can collect, for local switching alone, more than Kentucky Telephone currently charges as a composite rate for all elements involved in terminating traffic to high volume customers.

Carrier	MOU Annual 2010[6]	MOU Monthly 2010	Local Switching Band[7]	Current Local Switching Rate[8]
COMMONWEALTH TEL CO	440,666,528	36,722,210.67	3	$ 0.018449
CONSOLIDATED COMM-PA	206,475,759	17,206,313.25	1	$ 0.011069
N.ST. dba N. ST.COMM	183,274,081	15,272,840.08	2	$ 0.014760
MID-PLAINS TEL CO	149,593,450	12,466,120.83	1	$ 0.011069
SHENANDOAH TEL CO	98,243,054	8,186,921.17	1	$ 0.011069

Large carriers in Kentucky, such as Cincinnati Bell-Kentucky, also send and receive volumes of traffic that are far higher than Kentucky Telephone. For example, for the first three months of 2010, Cincinnati Bell of Kentucky reported an average of 18,823,361 minutes of traffic per month; South Central Bell Kentucky reported an average of 144,237,852 minutes of traffic per month for that same period.[9] And, it is fairly safe to assume that no LEC has "stimulated" anywhere close to the 1,047,114,596 of traffic that Verizon New York reported on average for the first three months of 2010.[10] In short, the presumption that volumes of traffic for all carriers with revenue sharing agreements will be at a particular level simply is not supported by the data.

The flawed logic in this assumption is problematic, not only because it may force CLECs to mirror carriers that have vastly different volumes and cost structures, but also because it is likely to do inadvertent harm to competition. Consider, for example, a rural CLEC that seeks to serve its first high volume customer. According to the proposed rules, the moment that carrier enters into a revenue sharing agreement, it would be forced to drop its tariffed rate, even though

6 *See* NECA, MOU DATA NECA TIER 2 COST COMPANIES 2006 – 2010, *available at:* http://www.fcc.gov/wcb/iatd/neca.html.

7 *See* NECA Tariff 5, § 17.5 (effective July 1, 2010).

8 *See id.*, § 17.2.3(A) (effective July 1, 2010).

9 *See* NECA March 2011 Supplemental Report of Access Minutes, *available at:* http://www.fcc.gov/wcb/iatd/neca.html.

10 *Id.*

traffic volumes may be quite low at that time and for the foreseeable future. In essence, the proposed rules would likely make it difficult for all carriers to compete equally.

IV. SPECIFIC ANALYSIS REGARDING THE COMMISSION'S PROPOSED RULES, AS THEY WOULD RELATE TO CLECS

A. THE PROPOSED TRIGGER AND ITS CORRELATION TO THE PROPOSED RATES FOR CLECS

The Commission has proposed "to adopt a trigger based on the existence of access revenue sharing agreements," which include "all payments, including those characterized as marketing fees or other similarly named payments that result in a net payment to the access stimulator."[11] The Commission states that "the sharing of significant amounts of interstate access revenues with another entity . . . raises questions about whether the underlying access rates remain just and reasonable. . . ."[12] Northern Valley and Kentucky Telephone do not take issue with this trigger, *per se*, but rather with the Commission's proposal for what would be required of CLECs when they meet the trigger, namely, the rates that the CLECs would be required to charge after meeting the trigger. To the extent that the Commission changes its proposed rules regarding the rates that would apply, the trigger may be appropriate. However, as the rules are currently drafted, the trigger is ill-suited to the task at hand.

To the extent that the Commission adopts its tentative conclusion that the existence of an access revenue sharing agreement, standing alone and without regard to the volumes of traffic and/or revenue sharing payments, is an indicator of unjust and unreasonable rates, then Northern Valley and Kentucky Telephone respectfully urge the Commission to provide CLECs with at least two alternatives for how rates could be established. Under the proposed rules, CLECs who

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11 NPRM, ¶ 659.

12 *Id.*

have revenue sharing agreements would be required to file a revised tariff mirroring the RBOC or largest ILEC in the state.[13] The Commission suggests this is the appropriate benchmark based on an assumption that a carrier that meets the trigger would have comparative volumes of traffic.[14] This assumption, however, is invalid, as discussed above. And, as such, a CLEC that meets the trigger, but otherwise maintains relatively low volumes of traffic, should have an alternative avenue available for determining its rates.

Specifically, Northern Valley and Kentucky Telephone submit that (assuming the Commission moves forward), it should allow CLECs to make an election. If the CLEC desires to avoid the "burden that would be imposed on competitive LECs from implementing detailed accounting and ratemaking requirements associated with using historical or projected costs as a basis for their interstate access rates," they may choose to file a revised tariff that utilizes some form of benchmarking or industry-wide rate. Alternatively, if the volumes of traffic and associated costs do not actually reflect the RBOC/ILEC costs and traffic volume, the CLEC should be entitled to accept the burden of filing its tariff with rates that conform to the requirement of section 61.38, which the Commission recognizes as among the available options to establish just and reasonable rates.[15] In short, there does not appear to be just one "right way" to ensure that rates are just and reasonable and, in fact, forcing all LECs to utilize a benchmark that relies on an assumption that may be invalid, is *not* a way to ensure that rates are just and

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[13] NPRM, ¶ 665.

[14] *Id.* ("This modification recognizes that competitive LECs that meet the trigger have access demand *likely* to be more comparable to that of the BOC in the state or of the incumbent LEC with the largest number of access lines. . . .").

[15] NPRM ¶ 665.

reasonable. CLECs should be given the flexibility to examine their particular situation and make a choice that best reflects that reality.

B. AS AN ALTERNATIVE BENCHMARK, THE COMMISSION SHOULD CONSIDER THE NECA RATE BAND 1 "LOCAL SWITCHING" ELEMENT AS AN APPROPRIATE BENCHMARK FOR RURAL CLECS

While the Commission has indicated a tentative conclusion that RBOC/ILEC rate would be the appropriate benchmark for rural CLECs that provide services to conference calling providers, Northern Valley and Kentucky Telephone urge the Commission to consider whether the "local switching" element for NECA Rate Band 1, stand along, may be an appropriate benchmark.

As the Commission is no doubt aware, implementation of the specific benchmarking mechanism adopted in the *Seventh Report and Order*[16] and has further elaborated upon in the *Eighth Report and Order*[17] has not been without disagreement. Indeed, the implementation of the order has resulted in litigation, as carriers have disputed the CLEC's ability to assess *all* of the "functional equivalent" rate elements for traffic that is being delivered to the CLEC's end user.[18] And, specifically with regard to calls terminating by rural CLECs to conference calling providers, IXCs have argued at various times about appropriateness of billing and collecting amounts attributable to transport elements, based on the observation that rural carriers charge to transport that traffic further distances before it is terminated.[19]

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16 16 FCC Rcd. 9923.

17 *In re Access Charge Reform*, CC Docket 96-262, 19 FCC Rcd. 9108 (2004) ("*Eighth Report and Order*").

18 *See PAETEC Commc'ns, Inc. v. MCI Commc'ns Servs., Inc.*, 712 F. Supp.2 d 405 (E.D. Pa. 2010).

19 By relaying this argument, Kentucky Telephone and Northern Valley do not in any way intend to imply that the argument has merit.

Based on this background, and because of the desire to see the Commission take action only insofar as it will promote certainty and mitigate the potential for on-going litigation, Northern Valley and Kentucky Telephone submit that the "local switching" element for NECA Rate Band 1 may be an appropriate benchmark for rural CLECs. As demonstrated above, there are many carriers that have volumes of traffic comparable to or higher than carriers with revenue sharing agreements. And, NECA's Tier 1 local switching element is generally associated with these carriers that have those higher volumes of traffic. Accordingly, such a rate is consistent with the Commission's suggestion that as volumes increase, rates should decrease.

Utilizing the NECA Rate Band 1 local switching element as a benchmark also has the distinct advantage of being clear, unambiguous, and uniform.[20] Adopting this benchmark, and directing rural CLECs that have revenue sharing agreements to utilize the local switching rate as the maximum composite rate that they may assess on the traffic that is subject to those agreements would ensure that no carrier is disadvantaged based on the state in which they operate. This high degree of certainty would therefore have the distinct advantage of significantly reducing the likelihood of future litigation regarding so-called "access stimulation." It would also continue the Commission's well-reasoned policy of allowing CLECs generally, and rural CLECs in particular, to avoid the need to undertake the costs associated with traditional ILEC tariffing obligations. Accordingly, Northern Valley and Kentucky Telephone encourage the Commission to allow rural CLECs with revenue sharing agreements to benchmark to the NECA Rate Band 1 as the maximum composite rate they may charge for originating or terminating any traffic that is subject to a revenue sharing agreement.

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[20] Pursuant to NECA's tariff, this rate is currently $0.011069/mou. And, of course, as the Commission moves towards unifying rates, this rate will decrease over time.

C. REVENUE SHARING IS REVENUE SHARING

As part of its discussion of the appropriate trigger, the Commission "invite[s] parties to comment on whether there are revenue sharing arrangements that are in the public interest and on revisions that would be necessary to the proposed rules to ensure that such arrangements are not encompassed by the rules."[21] As a general matter, Northern Valley and Kentucky Telephone are at a loss to understand how some revenue sharing agreements could be in the public interest (and thus allow CLECs to maintain higher rates), while others (presumably those involving free conferencing calling services) are (while not illegal) not in the public interest. Either LECs should have the ability to compete for end users that originate or terminate large volumes of calls by sharing a portion of the higher access revenue generated by those calls, or they should not. Either access revenue sharing is against the public interest, or it is not.

Of course, some commenters may suggest that revenue sharing with large end users, such as hospitals, universities, and call centers, is necessary in order to allow LECs to compete for those customers. But, plenty of hospitals, universities, and other businesses use free conference calling services to help run their businesses. Why should a LEC that originates these calls be able to share revenue (and not be subject to the modified tariffing requirements), but the LEC that terminates the exact same calls be forced to bear an extra regulatory burden or assess lower rates? There appears to be no principled reasoned for such an outcome.

D. THE COMMISSION SHOULD CLARIFY HOW THE PROPOSED NEW BENCHMARK FOR CLECS WOULD WORK

Insofar as the Commission moves forward in this docket, Northern Valley and Kentucky Telephone respectfully urge the Commission to adopt two interpretations that would provide

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[21] NPRM, ¶ 660 (footnotes omitted).

clarity regarding its intent and, by so doing, avoid necessary petitions for clarification or litigation in the future.

1. ANY LOWER RATE FOR CLEC ACCESS CHARGES SHOULD APPLY ONLY TO THE TRAFFIC SUBJECT TO A REVENUE SHARING AGREEMENT

First, the Commission's discussion of the proposed CLEC benchmark does not specifically indicate whether the lower rate would be applicable to all traffic originating or terminating by the CLEC once the CLEC has met the trigger, or only the traffic that is subject to an access revenue sharing agreement. Kentucky Telephone and Northern Valley urge the Commission to make the lower rates applicable to only to those minutes of traffic that are the subject of a revenue sharing agreement and otherwise allow rural CLECs to continue assessing the rural CLEC benchmark rate on traffic that is originating/terminating to the CLECs other customers.

The clarification urged by Northern Valley and Kentucky Telephone would appropriately recognize the increased infrastructure investments rural CLECs must incur to provide local loop connections to their end users in rural locations, while simultaneously addressing the concerns raised by the IXCs regarding the reasonableness of rates for traffic that are terminating to high volume end users, such as conference calling services.[22] Accordingly, it appropriately balances the Commission's historical objectives of recognizing the importance of promoting service to consumers in rural areas with the issues raised in the NPRM.

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[22] Both Northern Valley and Kentucky Telephone have adopted tariffs that provide a reduced composite rate for high volume end users, while maintaining rates that reflect the rural CLEC benchmark for the other traffic originating and terminating on their respective networks.

2. A CLEC SHOULD BE ABLE TO DEMONSTRATE THAT IT NO LONGER MEETS THE TRIGGER AND FILE A TARIFF THAT COMPLIES WITH THE COMMISSION'S STANDARD BENCHMARK RULES

Closely related to the desire to clarify the applicability of any lower rates that the Commission may adopt for CLECs that meet the relevant trigger, the Commission should also make clear that, if a CLEC's circumstances change over time and it no longer meets the trigger, it has the ability to file a further revised tariff removing the lower rates. This clarification is important to ensure that CLECs are not hamstrung by the Commission's rules as circumstances change over time.

Over the past few years, the free conference calling industry has been characterized by a high degree of fluidity, as technology, innovation, and litigation have each impacted various business models. Accordingly, it would be in error to assume that a carrier that has high volumes of traffic today associated with revenue sharing agreements, will necessarily continue to have high volumes of traffic next week, next month, or next year. Accordingly, in adopting rules that require this traffic to be treated differently than other access traffic, the Commission should be clear that the "trigger" is not irrevocable and that a carrier that once met the trigger, but no longer does, may revert back to the rules that would otherwise govern the tariffing of its rates.

3. THE COMMISSION SHOULD CLARIFY THAT CLECS WOULD BE ALLOWED TO COLLECT THE FULL BENCHMARK BECAUSE BY TERMINATING CALLS TO CONFERENCE CALLING PROVIDERS, THE LEC WOULD BE DELIVERING A CALL TO ITS END USERS

To the extent that the Commission moves forward with its proposal for CLECs with revenue sharing agreements to benchmark to the rates of the RBOC or ILEC (rather than the proposal encouraged by Northern Valley and Kentucky Telephone to use a single composite rate that is no higher than the NECA Rate Band 1 local switching element), the Commission should make clear that the CLEC is entitled to the "full" benchmark rate because it is providing service to its "own end users."

By way of background, in its 2001 *Seventh Report and Order*,[23] the FCC responded to disputes between IXCs and CLECs over CLEC interstate switched access rates by revising FCC tariff rules to align tariffed CLEC access rates more closely with ILEC access rates and by setting a benchmark rate for CLEC access rates. This benchmark was codified at 47 C.F.R. § 61.26. CLEC access rates at or below the benchmark were "conclusively deemed reasonable."[24] The FCC further clarified that its "benchmark rate for CLEC switched access does not require any particular rate elements or rate structure ... so long as the composite rate does not exceed the benchmark."[25] The FCC also described the basic service components that make up interstate switched access services: (i) transport (carrying the call from a point of interconnection with the IXC to an end office switch); (ii) switching (routing the call from the tandem trunk group to the end user's network connection); and (iii) common line (terminating the call to the end user's telephone).[26]

In the 2004 *Eighth Report and Order*, the FCC clarified the right of CLECs to charge the full benchmark established in the *Seventh Report and Order* by denying a Qwest Petition for Clarification.[27] In so ruling, the FCC stated that the rate elements identified in 47 C.F.R.

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[23] *See Seventh Report and Order*, 16 FCC Rcd. at 9924-25, 9934-36, ¶¶ 2, 28-33.

[24] *Id.* at 9925, ¶ 60.

[25] *Id.* at 9946, ¶ 55.

[26] *Id*.

[27] *See In re Access Charge Reform, Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, CC Docket 96-262, Qwest Petition for Clarification or, in the Alternative, Reconsideration (filed June 20, 2001).

§ 61.26(a)(3)[28] reflect the services that are needed to originate or terminate a call to a LEC's end users.[29] It found that a CLEC is providing the functional equivalent of the ILEC's interstate exchange access services when it provides access to its own end-users, and thus is entitled to charge the full benchmark.[30] Further, the Commission acknowledged that CLECs "are using different technologies, different network architectures and different pricing plans [than ILECs]," and said it intended "to preserve the flexibility that CLECs currently enjoy in setting their access rates."[31] Accordingly, when a CLEC originates or terminates a call to its end-user, it is entitled to charge the full benchmark rate.[32]

In addition to clarifying when a CLEC could charge the full benchmark, the FCC also created an additional new benchmark rule applicable only where a CLEC acts as an intermediary carrier and handles IXC traffic that is *not* originated or terminated by the CLEC's own end-users. Under this function-by-function benchmark rule, the FCC found "that the rate that a competitive

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28 Under 47 C.F.R. § 61.26(a)(3), the term interstate switched exchange access services "shall include the functional equivalent of the ILEC interstate exchange access services typically associated with the following rate elements: carrier common line (originating); carrier common line (terminating); local end office switching; interconnection charge; information surcharge; tandem switched transport termination (fixed); tandem switched transport facility (per mile); tandem switching."

29 *Eighth Report and Order*, 19 FCC Rcd. at 9114, ¶ 13.

30 *Id*. at 9115, ¶ 15 (finding that "a competitive LEC that provided access to its own end-users is providing the functional equivalent of the services associated with the rate elements listed in section 61.26(a)(3) and therefore is entitled to the full benchmark rate.").

31 *Seventh Report and Order*, 16 FCC Rcd. at 9946 & n.125.

32 See *PAETEC*, 712 F. Supp. 2d at 415 (finding that "where a CLEC routes calls to its end-users through a tandem switch, whether it owns that tandem switch or not, it may charge the full benchmark rate for that service. PAETEC has not violated the FCC's benchmark by charging Verizon for the functional equivalent of the tandem switching rate and the end-office switching rate for its [switched] access services.")

LEC charges *for access components* when it is not serving the end-user should be no higher than the rate charged by the competing incumbent LEC *for the same functions*."[33] Thus, this new function-by-function benchmark only is applicable to those situations where a CLEC acts as an intermediary carrier.[34]

In its NPRM, the Commission has tentatively concluded that CLECs, even those that otherwise qualify for the rural CLEC exemption, should be required to "benchmark to the rate of the BOC in the state in which the competitive LEC operates, or the independent incumbent with the largest number of access lines in the state if there is no BOC in the state. . . ."[35] Implicit in this discussion is a presumption that the CLEC would be entitled to the *full* benchmark rates and thus able to apply all of the RBOC rate elements because the conference calling providers and others would be considered "end users" for purposes of determining the appropriate rates. However, as the Commission knows, there has been protracted litigation about whether these sorts of high volume services are properly considered "end users."[36] Accordingly, in order to bring an end to these relentless legal battles, the Commission should make clear that it intends

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33 *Id*. ¶ 17; see also 47 C.F.R. § 61.26(f) ("If a CLEC provides some portion of the interstate switched exchange access services used to send traffic to or form an end user not served by that CLEC, the rate for the access services provide may not exceed the rate charged by the competing ILEC for the same access services").

34 *Id*.

35 NPRM, ¶ 665 (footnotes omitted).

36 *See generally Qwest Comm'cns Corp. v. Farmers and Merchants Mut. Tel. Co.*, EB-07-MD-001, 22 FCC Rcd. 17973 (2007) ("*Farmers I*"); *Qwest Comm'cns Corp. v. Farmers and Merchants Mut. Tel. Co.*, EB-07-MD-001, 24 FCC Rcd. 14801 (2009) ("*Farmers II*"); *Qwest Comm'cns Corp. v. Farmers and Merchants Mut. Tel. Co.*, EB-07-MD-001, 25 FCC Rcd. 3422 (2010) ("*Farmers III*") and *Qwest Commc'ns Corp. v. Superior Tel. Coop.*, Docket No. FCU, 2009 WL 3052208 (Sept. 21, 2009) ("IUB Order").

for the full benchmark to be applicable and that these service providers are appropriately classified as "end users" for purposes of this analysis.

V. IF THE COMMISSION ACTS TO REDUCE THE RATES THAT CLECS MAY ASSESS ON CALLS TO HIGH VOLUME SERVICES, IT SHOULD NOT DEPRIVE ABIDING CARRIERS OF OTHER RIGHTS

Unfortunately, just as the Commission has accepted assertions made by the IXCs without support, the Commission has proposed rules that appear to be unfairly one-sided in favor of those IXCs. For instance, while proposing to force rural CLECs with revenue sharing agreements to adopt a much lower benchmark rate than other CLECs, the Commission has offered no indication that it intends to do anything to ensure that those CLECs are actually paid, without years of prolonged litigation, for the services it provides under the revised tariffs. Indeed, quite the opposite, the Commission's proposed rules seem to be designed to punish those carriers that engage in revenue sharing, despite it being a lawful practice, by stripping those carriers of the ability to have their tariffs deemed lawful by operation of 47 U.S.C. § 204(a)(3). Accordingly, the Commission's proposed rules should be modified to eliminate this discriminatory treatment.

A. CARRIERS THAT FOLLOW THE RULES SHOULD NOT BE DENIED "DEEMED LAWFUL" STATUS

Northern Valley and Kentucky Telephone urge the Commission to reject its tentative conclusion that it can require carriers with revenue sharing agreements to file revised tariffs on sixteen days' notice in order to block those carriers from receiving the benefits of "deemed lawful" protection. The Commission's suggestion that it has the authority to deny carriers the protections afforded to them by Congress is both legally flawed and counter to good public policy.

As an initial matter, the Commission offers as justification for this potential unlawful course of action that "whether a LEC has met a proposed access stimulation trigger might not be readily apparent when the tariff is filed."[37] Thus, the Commission suggests, that it proposes to "require LECs that meet the trigger to file tariffs on a notice period other than the statutory seven or fifteen days."[38] The logical disconnect in this argument is apparent: if a carrier is forthcoming that it has met a so-called "access stimulation trigger" and is thus filing a new tariff, then the stated reason (*i.e.*, that it would not be clear whether the trigger has been met) falls away and there is no logical reason to exclude that carrier from receiving deemed lawful protection. To the extent that the Commission seeks to expand its arsenal to punish those that knowingly conceal the fact that they have triggered the filing requirements, it simply does not follow that it should prevent those that have not sought to obfuscate the truth from gaining deemed lawful status.

Both Northern Valley and Kentucky Telephone have voluntarily filed tariffs that contain a composite rate for traffic terminating to high volume end users that is well below the current CLEC benchmark applicable to them. When they filed these tariffs on 15 days' notice, they appropriately received the deemed lawful protection, which, by operation of law, forecloses the possibility that the Tariff will later be found to be retroactively unlawful. If the Commission were free to prohibit classes of carriers from filing a "deemed lawful" tariff, or declare those tariffs void *ab initio* at any time, it would render meaningless the plain language of section 204. And, the Commission's reliance on *ACS of Anchorage, Inc. v. FCC*, for the suggestion that it could preclude LECs who acknowledge that they have met any trigger that the Commission may ultimately adopt from being eligible for "deemed lawful" protection, is seriously flawed. If *ACS of Anchorage* offers any support for the notion that the Commission could deny carriers the

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37 NPRM, ¶ 666.

38 *Id.*

certainty that Congress intended (which is highly doubtful),[39] it would be only for those carriers that knowingly violate any rules that the Commission may adopt in order to require carriers to file modified tariffs, not those that comply with such rules.

In fact, when the Commission adopted its own interpretation of the meaning of section 204(a)(3), it observed that the provision "would differ radically from the current practice, where a rate that goes into effect without suspension and investigation is the 'legal' rate, leaving carriers liable for damages,"[40] and observed that many "commenters maintain that Congress intended to alter the regulatory treatment for LEC tariff filings by adjudging streamlined LEC filings lawful by operation of the statute without need for a regulatory hearing and determination."[41] Importantly, the Commission also concluded that its treatment of 204(a)(3) "is compelled by the language of the statute viewed in light of relevant appellate decisions, and that our alternative approach outlined in the NPRM is not a permissible reading of this statutory

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[39] *ACS of Anchorage, Inc. v. FCC*, 290 F.3d 403, 412 (D.C. Cir. 2002) (". . .bearing in mind that Commission control over the rate of return is under the statute merely a tool for determining the reasonableness of rates, see 47 U.S.C. § 201, we find § 204(a)(3) equally unambiguous in barring refunds purportedly for rate-of-return violations."); ("The Commission may have been confused by its pre-§ 204(a)(3) habit of retroactively assessing the lawfulness of a rate long after it had taken effect without advance suspension or initiation of hearing. As we noted in our 1995 *MCI* decision, it is virtually impossible to tell in advance just what rate of return a given rate may yield. In a world where the lawfulness of a rate is in almost endlessly suspended animation, the Commission may understandably feel entitled to receive ongoing updates of a company's calculations showing the links between its rates and its rate of return. But that is not the world of § 204(a)(3), where the rate itself, if filed and not suspended, is deemed lawful.'") (citations omitted); *see also Virgin Islands Tel. Corp v. FCC*, 444 F.3d 666, 673 (D.C. Cir. 2006) (observing that 204 was designed to avoid the situation where a carrier's tariff would be left in "almost endlessly suspended animation").

[40] *In re Implementaion of Section 402(b)(1)(A) of Telecomms. Act of 1996*, CC Docket No. 96-187, 12 FCC Rcd. 2170, ¶ 8 (1997).

[41] *Id.* ¶ 12

provision."[42] The Commission also concluded that "based on the language of the statute, that this is the balance between consumers and carriers that Congress struck when it required eligible streamlined tariffs to be deemed lawful."[43] The Commission also observed that the Act invests carriers (not the Commission) with the discretion to file pursuant to the streamlined tariffing procedures, or to choose "not to avail itself of the streamlining provisions."[44] Nowhere did the Commission suggest that it had the authority to make this election for an entire class of carriers. In sum, the Commission now seeks to disrupt what it has previously recognized is the balance that Congress unambiguously intended when it enacted section 204(a)(3) of the Act.

Moreover, the Commission's consideration of whether to prevent carriers from receiving "deemed lawful" protection focuses exclusively on the desire to be able to award retroactive refunds in the event that an ILEC over earns or a CLEC fails to adjust their rates to the appropriate benchmark. Thus, the discussion fails to acknowledge or take into consideration the full benefits that the Commission would be denying the LECs. In particular, 204(a)(3) offers "deemed lawful" protection with regard to any "charge, classification, regulation, or practice." As such, by denying "deemed lawful" protection, the Commission would be subjecting these LECs to challenges on all aspects of their tariffs, not simply the rates. Accordingly, the Commission's discussion demonstrates that this proposed course of action is not appropriately tailored to address the perceived harm.

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[42] *Id.* ¶ 18

[43] *Id.* ¶ 20

[44] *Id.* ¶ 34 (footnotes omitted).

B. THE COMMISSION SHOULD ENSURE THAT THE TARIFFED RATES ARE ACTUALLY BEING PAID BY QWEST, SPRINT, AND LEVEL 3

In addition to allowing the carriers that follow the rules to receive the "deemed lawful" status unequivocally intended by Congress, the Commission should also take some affirmative action to ensure that carriers that follow the rules are paid for the valuable services that they provide and are not forced into continued, protracted litigation. The Commission's position on the need for carriers to pay tariffed access charges, even if they dispute those charges, had been well settled for many years.[45] However, more recently, and in particular in its recent decision in *All American*,[46] the Commission has introduced unnecessary doubt about whether a carrier must, in fact, pay tariffed charges for the access services that LECs provide, or whether it is free to invent any reason, even a pretextual one, in order to avoid paying those charges.[47] And, after the

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45 *Tel-Central of Jefferson City, Missouri, Inc. v. United Tel. of Missouri, Inc.*, 4 FCC Rcd. 8338, 8339, ¶ 9 (1989) ('[T]he law is clear on the right of a carrier to collect its tariffed charges, even when those charges may be in dispute between the parties...."); *see also Business WATS, Inc., v. AT&T Co.*, 7 FCC Rcd. 7942, ¶ 2 (1989) ("a customer, even a competitor, is not entitled to the self-help measure of withholding payment for tariffed services duly performed but should first pay, under protest, the amount allegedly due and then seek redress if such amount was not proper under the carrier's applicable tariffed charges and regulations"), citing *In re MCI Telecomms. Corp.*, 62 FCC,2d 703, ¶ 6 (1976)); *see also National Commc'ns Ass'n v. AT&T Co.*, No. 93 CIV. 3707, 2001 WL 99856, at *4-5 (S.D.N.Y. Feb. 5, 2001) (citing both cases); *see also In re Kenneth E. Brooten, Jr. v. AT&T Corp.*, 12 FCC Rcd. 13343, n.53 (1997); *In re NOS Commc'ns, Inc. v. AT&T Corp.*, 7 FCC Rcd. 7889, ¶ 2 (1992).

46 *All American Co. v. AT&T Corp.*, 26 FCC Rcd. 723 (2011).

47 The Commission's unexplained (and inexplicable) about face aside, self-help refusals to pay access charges violate two sections of the Communications Act. Both the Commission and the courts have found that self-help constitutes a violation of Section 201(b) of the Communications Act, which prohibits "unreasonable practices." *See Global Crossing Telecomms., Inc. v. Metrophones Telecomms., Inc.*, 550 U.S. 45, 55 (2007); *MGC Commc'ns, Inc. v. AT&T Corp*., 14 FCC Rcd. 11647 (1999); *Tel-Central*, 4 FCC Rcd. 8338. In *MCI Telecommunications Corp.*, the Commission also found that MCI's "self-help approach" violates Section 203 of the Act and "existing case law." 62 FCC.2d at 705-06. The Commission explained:

nation's largest carriers have invented these reasons not to pay, they drag small carriers through years of unrelenting and costly litigation that cause further harm. This is *not* the telecommunications system of the future that Congress envisioned when it opened the markets to competition and, in particular, when it acted to create certainty for LECs that filed tariffs pursuant to 204(a)(3) of the Act. Accordingly, as the Commission considers modifying the rates that carriers can collect, they can and must take coordinated action to ensure that those rates are, in fact, paid. Otherwise, the vision of a fully competitive telecommunications environment, in which small carriers can compete on price and quality of service (rather than their ability to weather the litigation storm) will never become a reality.

Self-help imposes extraordinary economic burdens on small carriers, who are forced to resort to the expenses of litigation while being denied revenue from the same carriers that nevertheless continue to deliver calls to their networks (and bill their long-distance subscribers for those calls). It is not uncommon for carriers to have to expend 10% or more of their annual revenue in the years-long legal battles that ensue when Qwest, Sprint, and other carriers engage in unilateral withholding. So, at the same time that IXCs are billing and collecting for each of the calls that it sends to the LEC's network, that LEC is receiving no compensation for the use of its network (often even on the "traditional" traffic that the carriers don't dispute is compensable),

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> Section 203(c) of the Act specifically forbids carriers from charging or collecting different compensation than specified in an effective tariff. Tariffs which are administratively valid operate to control the rights and liabilities between the parties. Rates published in such tariffs are rates imposed by law. Withdrawal from this position would invite unlawful discrimination.

Id. 62 FCC.2d at 706, ¶ 6

The Commission noted that "finding that self-help is not an acceptable remedy does not leave MCI without recourse." *Id.* Sections 206-209 of the Act, the Commission noted, "set forth a complaint procedure to be used by persons who believe that a carrier is violating the Act." *Id.*

and spending considerable sums on litigation costs. Perhaps this scenario would be considered "just and reasonable" if one ignored entirely the significant size discrepancy between small LECs and the offending IXCs. But, once again, good policy is not made by ignoring the realities.[48]

And, the Commission's inaction and lack of enforcement against IXC self-help has emboldened carriers to the point that they now invent arguments to stop paying access charges that they have paid for years as part of a strategic and purposeful cash flow management program. By way of example, a recent decision from the Eastern District of Virginia demonstrates that, when the truth really comes to light, the excuses that Sprint uses in order to not pay carriers for access services are mere pretext for company-wide efforts to weather economic challenges on the backs of other carriers.[49]

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48 For example, according to Qwest's public records, it has been making profits on average of $1.2 billion per year over the course of the past four years. *See* http://investor.qwest.com/fundamentals (last visited: Mar. 29, 2011). In other words, Qwest's average profits exceed the Gross Domestic Product of twenty two of the world's smallest nations. *See* http://siteresources.worldbank.org/DATASTATISTICS/Resources/GDP.pdf (last visited: Mar. 29, 2011).

49 *See Cent. Tel. Co. of Va., et al. v. Sprint Commc'ns Co. of Va., Inc*, Civ. No. 09-cv-720, 2011 WL 778402, *3 (E.D. Va. Mar. 2, 2011):

> Quite frankly, Sprint's justifications for refusing to pay access on VoIP-originated traffic, and its underlying interpretation of the ICAs, defy credulity. . . . Sprint's defense is founded on post hoc rationalizations developed by its in-house counsel and billing division as part of Sprint's cost-cutting efforts, and the witnesses who testified in support of the defense were not at all credible.

See also id. at *13 (citations omitted):

> In the summer of 2009, Sprint, like many companies at the time, embarked on company-wide cost-cutting efforts. Notably, during this time period, Sprint launched a coordinated effort to contest access charges on VoIP-originated traffic with other carriers across the telecommunications industry. [FN 3: Sprint also sought to cut costs in a wide range of other areas beyond VoIP compensation.]

The LECs from which Qwest, Sprint, and Level 3 are withholding are vastly smaller than those carriers. Thus, many of the LECs are led by entrepreneurs that have personally invested in order to get their business off the ground. The total amounts in dispute are significant sums of money for these small carriers, but represent only a drop in the proverbial bucket for the IXCs. If allowed to persist, the unavoidable result will be that small competitive carriers are starved out of existence while their cases wind themselves through court. The net result will be an overall reduction in both competition, consumer choice, and the quality of telecommunications services in many rural areas.

The Commission has often recognized the potential for a host of negative consequences that flow from self-help.[50] For example, in the *Seventh Report and Order*, the Commission discussed IXC self-help against CLECs:

> Reacting to what they perceive as excessive rate levels, the major IXCs have begun to try to force CLECS to reduce their rates. The IXCs' primary means of exerting pressure on CLEC access rates has been to refuse payment for the CLEC access services. . . . We see these developments as problematic for a variety of reasons. We are concerned that the IXCs appear routinely to be flouting their obligations under the tariff system. Additionally, the IXCs' attempt to bring pressure to bear on CLECs has resulted in litigation both before the Commission and in the courts. And finally, the uncertainty of litigation has created substantial financial uncertainly on parties on both sides of the dispute. This uncertainty, in turn, poses a significant threat to the continued development of local-service competition, and it may dampen CLEC innovation and the development of new product offerings.[51]

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[50] *See, e.g., In re Establishing Just and Reasonable Rates for Local Exchange Carriers*, WC 07-135, 22 FCC Rcd. 11629, ¶ 5 (2007) ("*Call Blocking Order*") ("The Commission has been, and remains, concerned that call blocking may degrade the reliability of the nation's telecommunications network.") (citations omitted).

[51] *Seventh Report and Order*, 16 FCC Rcd. ¶ 23 (footnotes omitted).

Unfortunately, the concerns raised and admonitions given nearly ten years ago in the Commission's *Seventh Report and Order* remain as true today as they did in 2001 and have gone essentially unchecked. Concerns raised by the Commission about self-help and the impact it could have on the public interest are particularly critical in situations where, such as Kentucky Telephone, the LEC provides service to local emergency management and police departments.[52]

Respectfully, the Commission's NPRM ignores these important issues to the detriment of competitive carriers and their customers, generally, and rural competitive carriers and their customers, in particular. If the Commission remains inclined to accept the IXCs' position that more regulation is necessary, then, at the least, it should ensure that it actually brings an end to the distracting and resource-intensive litigation. Thus, to the extent that the Commission is going to take action to lower the access charges that competitive carriers like Northern Valley and Kentucky Telephone can collect, it becomes all the more incumbent upon the Commission to ensure that these carriers actually receive the payments to which they are entitled and are no longer forced into protracted legal battles that zap these carriers of the limited time and money that they have to run their businesses. Absent this *quid pro quo* where LECs are provided with some certainty that they're actually going to get paid, any downward adjustment to the rates CLECs can charge will have the perverse effect of forcing these carriers into the untenable position where they cannot afford to protect their rights.

Specifically, in evaluating the appropriate path forward, the Commission should make clear that an IXC's refusal to pay tariffed rates for interstate access services is a violation of section 201(b) of the Act, which prohibits "unjust and unreasonable practices." In this regard, careful review of the Supreme Court's decision in *Global Crossing Telecommunications, Inc. v.*

52 *See* Bluegrass Telephone Co., Inc. d/b/a Kentucky Tel. Co., Ex Parte, WC Docket 07-135 (Dec. 10, 2010).

Metrophone Telecommunications, Inc.,[53] is warranted. In *Global Crossing*, the Supreme Court affirmed the Commission's decision that a failure by a long-distance provider to pay the compensation owed to a pay phone operator was an unjust and unreasonable practice in violation of section 201(b).

The Supreme Court observed that the Commission's determination was reasonable, "[t]hat is to say, in ordinary English, ***one can call a refusal to pay*** Commission-ordered compensation despite having received a benefit from the payphone operator a "practice[e] … in connection with [furnishing a] communication service . . . that is . . . ***unreasonable***." *Id.* at 55 (alteration in original) (emphasis added). The Supreme Court's discussion of the history of the Communications Act and the Commission's rate-setting practices are also pertinent. For example, the Court observed:

> The history of these sections-including that of their predecessors, §§ 8 and 9 of the Interstate Commerce Act-simply reinforces the language, making clear the purpose of § 207 is to allow persons ***injured by § 201(b)*** violations to bring federal-court damages actions. *See, e.g., Arizona Grocery Co.*, 284 U.S., at 384-385, 52 S.Ct. 183 (Interstate Commerce Act §§ 8-9); Part I-A, supra. History also makes clear that ***the FCC has long implemented § 201(b) through the issuance of rules and regulations***. This is <u>***obviously***</u> ***so when the rules take the form of FCC approval or prescription for the future of rates that exclusively are "reasonable."*** *See* 47 U.S.C. § 205 (authorizing the FCC to prescribe reasonable rates and practices in order to preclude rates or practices that violate § 201(b)); 5 U.S.C. § 551(4) ("'rule' ... includes the approval or prescription for the future of rates ... or practices"). It is also so when the FCC has set forth rules that, for example, require certain accounting methods or insist upon certain carrier practices, while (as here) prohibiting others as unjust or unreasonable under § 201(b).

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[53] *Global Crossing Telecomms., Inc. v. Metrophone Telecomms., Inc.*, 550 U.S. 45 (2007),

> Moreover, the underlying regulated activity at issue here resembles activity that both transportation and communications agencies have long regulated. Here the agency has determined through traditional regulatory methods the cost of carrying a portion (the payphone portion) of a call that begins with a caller and proceeds through the payphone, attached wires, local communications loops, and long-distance lines to a distant call recipient. The agency allocates costs among the joint providers of the communications service and requires downstream carriers, in effect, to pay an appropriate share of revenues to upstream payphone operators. Traditionally, the FCC has determined costs of some segments of a call while requiring providers of other segments to divide related revenues. *See, e.g., Smith v. Illinois Bell Telephone Co.*, 282 U.S. 133, 148-151, 51 S.Ct. 65, 75 L.Ed. 255 (1930) (communications). And traditionally, transportation agencies have determined costs of providing some segments of a larger transportation service (for example, the cost of providing the San Francisco-Ogden segment of a San Francisco-New York shipment) while requiring providers of other segments to divide revenues. *See, e.g., New England Divisions Case*, 261 U.S. 184, 43 S.Ct. 270, 67 L.Ed. 605 (1923); *Chicago & North Western R. Co.*, 387 U.S. 326, 87 S.Ct. 1585, 18 L.Ed.2d 803; *cf. Cable & Wireless P.L.C.*, 166 F.3d, at 1231. In all instances an agency allocates costs and provides for a related sharing of revenues.
>
> In these ***more traditional instances***, transportation carriers and ***communications firms entitled to revenues under rate divisions or cost allocations might bring lawsuits under § 207***, or the equivalent sections of the Interstate Commerce Act, and ***obtain compensation or damages***. *See, e.g., Allnet Communication Serv., Inc. v. National Exch. Carrier Assn., Inc.*, 965 F.2d 1118, 1122 (C.A.D.C.1992) (§ 207); *Southwestern Bell Tel. Co.*, supra, at 305, 43 S.Ct. 544 (same); *Chicago & North Western Transp. Co.,* supra, at 1224-1225 (Interstate Commerce Act equivalent of § 207).

Id. at 53-57 (emphasis added).

Also of significance, the Supreme Court specifically rejected the argument recently suggested by the Commission that an IXC's failure to pay cannot constitute a violation of the

Act, because the IXC receives service as a "customer" (rather than a "carrier") and the Act only addresses actions of "carriers."[54] Specifically, the Supreme Court stated:

> Third, Justice THOMAS . . . disagrees with the FCC's interpretation of the term "practice." ***He, along with Global Crossing, claims instead that §§ 201(a) and (b) concern only practices that harm carrier customers, not carrier suppliers.*** *Post*, at 1531 - 1532 (SCALIA, J., dissenting); Brief for Petitioner 37-38. ***But that is not what those sections say. Nor does history offer this position significant support.*** A violation of a regulation or order dividing rates among railroads, for example, would likely have harmed another carrier, not a shipper. *See, e.g., Chicago & North Western Transp. Co*., 609 F.2d, at 1225-1226 ("Act ... provides for the regulation of inter-carrier relations as a part of its general rate policy"). Once one takes account of this fact, it seems reasonable, not unreasonable, to include as a § 201(b) (and § 207) beneficiary a firm that performs services roughly analogous to the transportation of one segment of a longer call. We are not here dealing with a firm that supplies office supplies or manual labor. *Cf., e.g., Missouri Pacific R. Co. v. Norwood*, 283 U.S. 249, 257, 51 S.Ct. 458, 75 L.Ed. 1010 (1931) ("practice" in § 1 of the Interstate Commerce Act does not encompass employment decisions). The long-distance carrier ordered by the FCC to compensate the payphone operator is so ordered in its role as a provider of communications services, not as a consumer of office supplies or the like. It is precisely because the carrier and the payphone operator jointly provide a communications service to the caller that the carrier is ordered to share with the payphone operator the revenue that only the carrier is permitted to demand from the caller. *Cf. Cable & Wireless P.L.C.*, 166 F.3d, at 1231 (finding that § 201(b) enables the Commission to regulate not "only the terms on which U.S. carriers offer telecommunication services to the public," but also "the prices U.S. carriers pay" to foreign carriers providing the foreign segment of an international call).

Id. at 62-63 (emphasis added). Accordingly, consistent with *Global Crossing*, when and if the Commission acts to modify the rules applicable to high volume services, such as free conference

[54] *All American*, ¶ 18 ("the provisions of the Act and our rules regarding access charges apply only to the provider of the service, not to the customer; and they govern only what the provider may charge, not what the customer must pay.").

calling services, it should also make clear that failure to pay those tariffed rates would be an unjust and unreasonable practice in violation of section 201(b) of the Act.

VI. COMMENTS REGARDING THE COMMISSION'S INITIAL REGULATORY FLEXIBILITY ANALYSIS

In addition to substantive issues addressed above, Northern Valley and Kentucky Telephone observe that the Commission has failed to provide an adequate Initial Regulatory Flexibility Analysis ("IRFA") as required by 5 U.S.C. § 603. The Commission's IRFA is too generalized to adequately address the impact that *each* of the rules that the Commission is proposing will have on small businesses, such as Northern Valley and Kentucky Telephone, and, in particular, offers scant analysis of the economic impact that its "access stimulation" rules will have on small businesses.

As the Small Business Administration describes in *A Guide For Government Agencies: How to Comply with the Regulatory Flexibility Act*:[55]

> The agency then ***must*** **examine the costs and other economic** implications for the industry sectors targeted by the rule. Impacts include costs of compliance and economic implications that derive from additional compliance costs such as economic viability (including closure), competitiveness, productivity, and employment. The analysis should identify cost burdens for the industry sector and for the individual small entities affected. Costs might include engineering and hardware acquisition, maintenance and operation, employee skill and training, administrative practices (including recordkeeping and reporting), productivity, and promotion. The agency ***must*** **also consider alternatives to the proposed regulation that would accomplish the agency's goals** while not disproportionately burdening small businesses. As part of the discussion of the alternatives under section 603(c), it is recommended that the agency address, in less detail than in the proposal, the costs and other economic implications.

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55 *Available at*: http://archive.sba.gov/advo/laws/rfaguide.pdf (emphasis added).

> The results of the analysis should allow interested parties to compare the impacts of regulatory alternatives on the differing sizes and types of entities affected by the rule. It will enable direct comparison of small and large entities to determine the degree to which the alternatives chosen disproportionately affect small entities or a specific subset of small entities. Further, the analysis will examine whether the alternatives are effectively designed to achieve the statutory objectives.

The Commission's IRFA simply fails to include a substantive an analysis of any of the required elements of the IRFA with regard to the proposed "access stimulation" rules, despite the significant economic impact the rules would have on small businesses. It does not permit interested parties to understand the impacts of potential alternative or to understand the disproportionate impact the changes proposed will have on small LECs, generally, and rural LECs, in particular. Accordingly, the Commission should decline to take any action on the proposed rules until an adequate analysis has been completed and released to the public for comment.

VII. CONCLUSION

In sum, while Kentucky Telephone and Northern Valley doubt that the need for new regulation has actually been established, they strongly urge the Commission to approach any such rulemaking process with a desire to achieve certainty for the industry. Accordingly, the Commission should not only take actions to correct what it perceives to be a need to modify the rates applicable to traffic, but it should also make clear that LECs are once again paid for the services that they provide. Moreover, the Commission should not proceed with making any rules that would unfairly (and unlawfully) deny carriers that file revised tariffs in conformance with any new rules the ability to gain "deemed lawful" status.

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Respectfully submitted,

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